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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF
CITY OF NEW YORK, TRUSTEE,
ETC., *et al.*,

Respondents.

10-11
Nos. ~~421-422~~

THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK, TRUS-
TEE, ETC.,

Petitioners,

vs.

CITIZENS GAS COMPANY OF INDI-
ANAPOLIS, *et al.*,

Respondents.

12-13
Nos. ~~423-424~~

**ANSWER BRIEF OF PETITIONERS CITY OF INDIAN-
APOLIS, ET AL., TO RESPONDENT CHASE'S
SUPPLEMENTAL BRIEF.**

WILLIAM H. THOMPSON,

PERRY E. O'NEAL,

PATRICK J. SMITH,

*Counsel for City et al., Petitioners
and Cross-Respondents,*

1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
*City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.*

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**ANSWER BRIEF OF PETITIONERS CITY OF INDIAN-
APOLIS ET AL., TO RESPONDENT CHASE'S
SUPPLEMENTAL BRIEF.**

This brief is submitted in answer to the Supplemental Brief of respondent Chase. Leave is asked to file this answer brief if leave is granted respondent for filing its Supplemental Brief.

**NO STATUTORY AUTHORITY FOR CITY OF INDIAN-
APOLIS TO ASSUME OBLIGATIONS OF LEASE.**

At the time the lease in question here was executed by Indianapolis Gas and Citizens Gas, Chapter 229 of the Acts of the Indiana General Assembly 1911 (Pg. 561) was in full force. Section 2 of Chapter 229 prohibited any city or town in Indiana from purchasing or

leasing any utility works without first obtaining an approval of such purchase or lease by popular vote of the electors of such city or town.

In the case of *Todd v. Citizens Gas Company* (1931, 46 F. 2d 855, 865) (Res. Supp. br. pg. 2) Newton Todd sought to prevent the city from taking over the property comprising the public charitable trust being operated by the initial trustee Citizens Gas Company. Among other things, Todd alleged that the attempt on the part of the City to take over the property of Citizens Gas was *ultra vires* because no popular election had been held. (II R. 714) Defendant City answered this allegation by admitting no election had been held because the provisions of the statute relied upon by Todd did not apply. It was further alleged that by the terms of Section 53 of Chapter 129, Acts of the Indiana General Assembly 1905 (Page 219, 247)

"the Common Council of said City had power by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such city to carry them out." (II R (1) 737).

The Circuit Court of Appeals held (Pg. 866) that the franchise contract from the City to the initial trustee Citizens Gas was neither a purchase nor a contract for a purchase. The Court said:

"It was an agreement by which the City obtained an interest in the plant subject to the charge in favor of the certificate holders. No funds of the City were paid, or contracted to be paid, for the plant. We think that approval at an election was not essential to the validity of the contract. And certainly this is true if a trust was created, as above pointed out, for the City in express terms is given power to receive public trusts."

In its original brief respondent Chase, in speaking of the City's answer in the Todd case, asserted (page 94):

"In that case the City correctly interpreted this statute, but gave it an interpretation which is directly contrary to the argument it is now advancing."

In this Chase is mistaken. The Common Council of the City has the power to enact ordinances for the purpose of receiving public trusts and agreeing to conditions and terms accompanying the same and bind the corporation to carry them out. (Sec. 53, Acts 1905, Clause 6th, pg. 247). The conditions and terms, however, must be such as are authorized by law and within the powers of the City to carry out. Compare *Dykeman v. Jenkins* (1913) 179 Ind. 549, 559.

At the time the lease was executed the City was prohibited by statute from leasing utility works without first obtaining approval by popular vote of the electors of the City. (Acts 1911, Chap. 229, Sec. 2, pg. 563).

There has never been an approval by popular vote of the electors of the City in respect of the 99 year lease in question here.

Furthermore, the City expressly rejected an assignment of the lease (I R. 130, II R. 468, II R. 423, III R. 1019). The rejection of the assignment was ratified by an ordinance of the Common Council of the City (III R. 1017, 1018, offered II R. 429).

No approval of the execution of the lease has ever been given by (a) City Council (III R. 982, offered II R. 424), (b) Board of Public Works of City (II R. 932, offered II R. 424), (c) Board of Trustees of the Department of Utilities of City (III R. 924, offered II R. 425).

or (d) Board of Directors of the Department of Utilities of City (III R. 985, offered II R. 425). No other officers of the City had or now have power or authority to take any action in connection with the lease.

The answer of the City in the Todd case alleged simply and solely that the City Council had power by ordinance to *receive* public trusts without the approval of the electors of the City. It was not alleged nor could it have been alleged that the City had power to accept the lease without approval of the electors because the lease was not a condition or term *accompanying* the trust, but was entered into by Citizens Gas Company, lessee, and Indianapolis Gas, lessor, in 1913, several years after the trust was created. The City was not a party to the lease nor is it named in the lease. It never ratified it nor accepted it, but, on the contrary, expressly rejected an assignment of it.

Chase asserts in its supplemental brief in speaking of the operation of the Indianapolis Gas property by the City (p. 4) that:

"The only agreement between the City and Indianapolis Gas prior to March 2, 1936, is that set forth in the two letters of September 30th relating to the interest payment of October 1, 1935."

This statement of Chase is contrary to the fact.

The trial court found as its finding of fact No. 51 (III R. 1185):

"That in pursuance of agreements made between the City and The Indianapolis Gas Company, which agreements have been continuously in effect since September 9, 1935, the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company.

Such agreements provided, among other things, in substance that such operation by the City should not prejudice the rights of either the City or The Indianapolis Gas Company, and further provided that the City by operating such plant did not recognize the validity of the lease and The Indianapolis Gas Company by consenting to such operation did not admit that the lease was invalid."

Leading up to the agreement for temporary use of the property to commence on September 9, 1935, certain correspondence was interchanged between the City by its Board of Directors for Utilities or its counsel and officers of the Indianapolis Company or the corporation itself. One such letter was written on August 31, 1935 (P. X. 59, III R. 837, offered II R. 329). Another such letter was written on September 30, 1935. (P. X. 66, III R. 838, offered II R. 329). On February 8, 1936, Indianapolis Gas, in a letter to the Board of Directors for Utilities, called attention to the near approach of March 9, 1936, "at which time our *tentative arrangement* will expire." (Our emphasis) (P. X. 75, III R. 839, offered II R. 329).

On September 9, 1935, the Board of Directors for Utilities of the City adopted a resolution for the temporary use of the property of the Indianapolis Gas Company (I R. 200).

The resolution for temporary use, together with the rejection by the City of Indianapolis of the assignment of the 99 year lease, were delivered to Mr. William J. Yule, Secretary of the Indianapolis Gas Company, on September 9, 1935. (II R. 463).

On March 2, 1936, shortly prior to the expiration of the six months' temporary use agreement, a standstill agreement was entered into between the Department of Utili-

ties of the City of Indianapolis and the Indianapolis Gas Company. (I R. 205-207).

The other assertions of Chase made in its Supplemental Brief have been fully presented to the Court in the City's briefs, heretofore filed or in the oral presentation on February 7, 1941.

Respectfully submitted,

WILLIAM H. THOMPSON,

PERRY E. O'NEAL,

PATRICK J. SMITH,

*Counsel for City et al., Petitioners
and Cross-Respondents,*

1350 Consolidated Building,

Indianapolis, Indiana.

EDWARD H. KNIGHT,

Corporation Counsel,

MICHAEL B. REDDINGTON,

City Attorney of Indianapolis,

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